APPENDIX B

Stipulation of Facts Filed With the United States Court of Claims in Petitioner's Case

IN THE
UNITED STATES COURT OF CLAIMS
No. 355-57

MEMPHIS TRANSIT COMPANY,
Plaintiff,

versus

THE UNITED STATES,
Defendant.

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsels, that the facts hereinafter stated shall be taken as true, provided however that this stipulation shall be without prejudice to the right of either party to introduce upon the trial of this action any other and further evidence not inconsistent with the facts herein stipulated, and further reserving to either party the right to object to any fact herein stipulated on the ground that such fact is irrelevant or immaterial:

1. The first claim arises under the Internal Revenue laws of the United States and more particularly Sections 23, 113 and 718 of the Internal Revenue Code of 1939. The second claim arises under the Internal Revenue laws

of the United States and more particularly Sections 23, 113 and 718 of the Internal Revenue Code of 1939. The third claim arises under the Internal Revenue laws of the United States and more particularly Sections 23 and 113 of the Internal Revenue Code of 1939.

2. The jurisdiction of this Court is based upon Title 28, United States Code, Section 1491, in that these claims against the United States are founded upon an Act of Congress.

3. No action upon the claims, other than as set forth in the petition, has been taken by plaintiff before the Congress or any of the departments of the United States or in any court and no assignment or transfer of said claims or any part thereof has been made by plaintiff.

4. At all times hereinafter mentioned plaintiff was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Tennessee, having been incorporated on March 28, 1895, with offices at 821 Beale Avenue, Memphis 1, Tennessee. Formerly the plaintiff's corporate name was The Memphis Street Railway Company; this name was changed to Memphis Transit Company pursuant to a resolution duly adopted by the stockholders of the plaintiff on March 21, 1958.

5. Plaintiff is engaged primarily in the operation of a motor bus and trackless trolley system in the City of Memphis. Prior to 1945 plaintiff was engaged primarily in the operation of an electric street railway system in the City of Memphis.

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6. During the period February 22, 1905 to December 18, 1905, the plaintiff was in the business of operating a street railway over the lines owned by it in the City of Memphis.

7. The Memphis Street Railway Extension Company (hereinafter sometimes referred to as "Extension Company") was a corporation duly organized and existing under the laws of the State of Tennessee, having been incorporated on or about February 21, 1905.

8. The original subscribers to the stock of Extension Company were as follows:

W. S. McCrea	496 shares
Frank G. Jones	1 share
Robert L. Benson	1 share
James F. Meagher	1 share
Edward J. Karr	1 share
Total	500 shares

W. S. McCrea had been associated with the affairs of the plaintiff for a period of approximately five years prior to the incorporation of Extension Company. He was elected a director of the plaintiff on January 26, 1899 and as Secretary of the plaintiff on April 24, 1899. He continued to serve in these capacities until his resignation on March 4, 1905.

Under date of March 4, 1905, W. S. McCrea assigned 496 shares of Extension Company capital stock held by him to Ford, Bacon & Davis as evidenced by photostatic copy of said assignment attached hereto as Exhibit A. Said assignment appears on page 27 of the corporate minute book of Extension Company. During the period

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March 5, 1905 to December 18, 1905, the date upon which Extension Company entered into a contract to transfer all of its properties to the plaintiff, there were various transfers of stock so that on December 18, 1905 the holders of record were as follows:

Isidore Newman & Sons	495 shares
A. H. Ford	1 share
E. W. Ford	1 share
E. A. Neugass	1 share
L. K. Thompson	1 share
R. L. Crump	1 share
Total	500 shares

9. At the time of the organization of Extension Company on or about February 21, 1905, the following were the stockholders of record of plaintiff:

C. K. G. Billings	3,331 shares
Frank G. Jones	1,666 shares
W. S. McCrea	1 share
Robert L. Benson	1 share
C. H. Ruddock	1 share
Total	5,000 shares

Under date of March 4, 1905, the then total outstanding 5,000 shares of plaintiff's capital stock were assigned to Isidore Newman & Sons, Trustees by the following then holders of said shares:

C. K. G. Billings	3,330 shares
Frank G. Jones	1,666 shares
W. S. McCrea	1 share
Robert L. Benson	1 share
James F. Meagher	1 share
E. J. Karr	1 share
Total	5,000 shares

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A photostatic copy of said assignment is attached hereto as Exhibit B. Said assignment is attached to The Memphis Street Railway Company stock certificate No. 18 in said company's stock certificate book. During the period March 5, 1905 to December 18, 1905, the date upon which Extension Company entered into a contract to transfer all of its properties to plaintiff, there were various transfers of plaintiff's stock so that on December 18, 1905 plaintiff's stock was owned by the following holders:

Isidore Newman & Sons, Trustees	4,989 shares
T. H. Tutweiler	1 share
W. B. Rogers	1 share
J. H. Watkins	1 share
J. R. Pepper	1 share
W. B. Brockway	1 share
T. M. R. Meikleham	1 share
Henry P. Dart	1 share
Jos. H. Thompson	1 share
W. B. Yereance	1 share
E. E. Vreeland	1 share
W. B. Mallory	1 share
Total	5,000 shares

10. On or about February 22, 1905, Extension Company received a franchise from the Legislative Council of the City of Memphis to construct, operate and maintain a street railway system over certain streets in the City of Memphis. Acting under the authority granted in said franchise, Extension Company entered into an engineering contract with Ford, Bacon & Davis as result of which approximately fifteen miles of railway lines were con-

structed prior to December 18, 1905. The lines so constructed are shown on the map hereto attached as Exhibit C. The location of said lines in the City of Memphis and environs is shown on the statement attached as Exhibit D. A photostatic copy of the minutes of the directors' meeting of Extension Company held May 11, 1905 authorizing said contract with Ford, Bacon & Davis is attached hereto as Exhibit D-1. Exhibit D-2 hereto attached is a photostatic copy of page 12 of the construction ledger of Extension Company which shows by months from April 1905 to December 1905 the details of the construction charges for said railway lines. Exhibit D-3 is a photostatic copy of eleven purchase orders issued by Ford, Bacon & Davis acting under said engineering contract and relating to construction of said fifteen miles of railway lines. During the period February 22, 1905 to December 18, 1905, Extension Company was engaged in exercising the franchise granted to it by the City of Memphis, thereby preventing such franchise from lapsing, by the construction of street railway lines in the areas for which its franchises had been granted and in providing the equipment necessary to operate such railways.

11. During the period subsequent to organization of Extension Company and prior to December 18, 1905, Extension Company borrowed $650,000. The circumstances of such borrowing are explained by Journal Entry #6 which appears on page 1 of The Memphis Street Railway

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Company Journal for December 1905 and which entry reads as follows:

"Bills Payable	$650,000	
To Bills Receivable		$650,000

This Company has at various times borrowed money from Isidore Newman & Sons upon promissory notes. It has also loaned money to The Memphis Street Railway Extension Co. upon that company's promissory notes. By an arrangement with Isidore Newman & Sons they take the notes of The Memphis Street Railway Extension Company to this company in payment of and exchange for this company's notes to Isidore Newman & Sons. The exchange is made as of Dec. 18, 1905."

12. In an offer dated December 18, 1905 set forth in the minutes of a meeting of stockholders of Extension Company held on the same date, a true copy of said minutes being hereto attached as Exhibit E, Extension Company offered to convey to plaintiff "all its property, real, personal and mixed, and its franchises, immunities, rights and privileges, with the exception of its franchise or right to be a corporation." These properties are described in detail at Exhibit E-1, which is the minutes of an adjourned special meeting of the board of directors of Extension Company held at 6:00 P.M. on December 18, 1905. The transfer of these properties was to be free and

clear of all indebtedness except for the outstanding liability of Extension Company to pay off $650,000 of its promissory notes which Extension Company agreed to pay upon receipt of the purchase price. In return, plaintiff was to pay a purchase price of 25,000 shares of plaintiff's common capital stock in the aggregate amount of $2,500,000 par value and $700,000 principal amount of plaintiff's Consolidated Mortgage 5% Gold Bonds. Extension Company's offer was approved by plaintiff's stockholders at an adjourned special meeting of said stockholders held December 18, 1905 and was accepted by plaintiff's officers under authority of the directors of plaintiff at a meeting of plaintiff's directors held December 18, 1905. Said agreement was carried out according to its terms as shown by minute of an adjourned special meeting of the board of directors of Extension Company held at 6:00 P.M. December 18, 1905; see Exhibit E-1.

13. On December 18, 1905, the stockholders of plaintiff duly authorized and approved issuance of the following amounts of stock: 25,000 shares of preferred stock having a par value of $100 per share and 25,000 shares of common capital stock having a par value of $100 per share. On December 18, 1905 stockholders of plaintiff duly authorized and approved a transaction thereafter carried out whereby the 5,000 shares of capital stock then outstanding would be retired and the holders of such 5,000 shares of capital stock would be issued 25,000 shares of the new preferred stock having a par value of $100 per share.

14. On December 18, 1905, the plaintiff's stockholders further approved issuance of the 25,000 shares of new

$100 par value common capital stock of the plaintiff to Extension Company as part of the purchase price of Extension Company's properties, and issuance of $700,000 of the Consolidated Mortgage 5% Gold Bonds of the plaintiff to Extension Company for the remainder of such purchase price. This purchase transaction was carried out; see Exhibit E-1.

15. Extension Company maintained its own corporate minutes, stock certificate books and books of account. The corporate minute books contained minutes of stockholders' and directors' meetings from February 21, 1905 through December 18, 1905. The stock certificate book showed nine stock certificates issued, some of which were reissued. The books of account included a construction ledger, an accounts receivable ledger of approximately 21 pages, a cash book, a bound journal, and several typewritten pages containing journal entries which were copies of entries in the bound journal. The records of Extension Company show journal entries in the closing of said books at December 31, 1905, a copy of which is attached hereto as Exhibit F.

16. A cost basis of plaintiff's total properties as at December 31, 1912 has been determined as the sum of $9,843,000 as shown by an Internal Revenue Service Valuation Report dated October 23, 1946 signed by Engineer Revenue Agent Karl Schmitt and approved by S. H. Thompson, Engineer Reviewer, a copy of which is hereto attached as Exhibit G; the properties owned by plaintiff on December 31, 1912 included those acquired by plaintiff from Extension Company as stated in paragraph "13"

hereof but said cost of $9,843,000 does not include any value in respect of the 25,000 shares of plaintiff's common capital stock issued on December 18, 1905.

17. Beginning in 1945 plaintiff embarked upon a program of substituting motor bus and trackless trolley coach operations, herein referred to as motor bus operations, for its street railway operations, and as a result of such program abandoned its street railway lines and operations. Plaintiff completed full substitution of motor bus operations and consequent abandonment of its street railway operations in 1947. Upon abandonment of its street railway lines and operations plaintiff claimed and was allowed by the Commissioner of Internal Revenue an obsolescence loss in respect thereof in the computation of its liability for Federal income and excess profits taxes. Fifty percent of the loss attributable to such abandonment was allowed as an obsolescence loss for the year 1945, forty percent as an obsolescence loss for the year 1946, and ten percent as an obsolescence loss for the year 1947, as shown by Exhibit K of the Revenue Agent's Report dated June 20, 1949 a photostatic copy of which Report is attached hereto as Exhibit H.

18. The abandonment loss referred to in paragraph "17" hereof includes intangible costs attributable to plaintiff's properties no part of which prior to said abandonment had been allowed as a deduction for Federal income tax purposes either by way of depreciation, amortization or otherwise.

19. It has been established and determined that 75% of the intangible costs attributable to plaintiff's properties

is a part of the total cost of plaintiff's properties in respect of which the obsolescence losses arise in the years as stated in paragraph "17" hereof. Such determination is shown in the Internal Revenue Service Valuation Report attached hereto as Exhibit G and also in a subsequent Internal Revenue Service Valuation Report dated November 17, 1947 and September 13, 1948, respectively, each of which reports is attached hereto as Exhibits I and J, respectively.

20. The obsolescence losses in respect of plaintiff's properties including as a part thereof 75% of the intangible costs attributable to said properties were allowed in recomputation of plaintiff's tax liability for the period April 1, 1943 to December 31, 1943, the calendar years 1944 and 1947 and plaintiff's net loss for the calendar years 1945 and 1946, as shown on page 4 of Internal Revenue Service Valuation Report of October 23, 1946 (Exhibit G attached) and the following pages and Exhibit K of Revenue Agent's Report dated June 20, 1949 (Exhibit H attached):

Year 1945—Schedule 16A Exhibit K (of Agent's Report)
Year 1946—Schedule 24A Exhibit K (of Agent's Report)
Year 1947—Schedule 31A Exhibit K (of Agent's Report)

(Note: Year 1946 applicable as part of net operating loss deduction for 1944).

Plaintiff's tax liability for said years has been determined and paid on the basis of its filed returns as changed by said Revenue Agent's Report dated June 20, 1949 (Exhibit H attached) for such years. The amounts of said liability are shown on "Statement of Total Tax Liability" which

is part of said Revenue Agent's Report (First page of Exhibit H attached).

21. For the purpose of the allowance of the obsolescence losses allowed as stated in paragraph "20" hereof the measure of the intangible costs referred to in said paragraph was computed as being the amount by which the total costs of plaintiff's properties determined as at December 31, 1912 exceeded the total cost of such properties attributable solely to tangible physical properties. The Internal Revenue Service Valuation Report referred to in paragraph "16" hereof shows the total of such intangible costs as $2,457,609.20. Said Valuation Report on page 4 thereof determined such intangibles cost as that part of the cost of plaintiff's total properties which remained after deducting from such total cost the portion thereof attributable to physical properties, as follows:

"Cash cost or equivalent of property 12/31/12"	$9,843,000.00
"Total classified cost"	7,385,390.80
"Cost attributable to Intangibles"	$2,457,609.20

Said Valuation Report further determined that such intangibles cost continued applicable as part of the cost of plaintiff's properties at December 31, 1944.

22. The "Cost attributable to Intangibles" referred to in paragraph "21" hereof was determined by ascertaining, first, a total cost basis of plaintiff's properties at December 31, 1912, stated in paragraphs "16" and "21" hereof as the sum of $9,843,000, and, second, the total cost basis of the

physical properties of plaintiff exclusive of any intangible costs at the same date, stated in paragraph "21" hereof as $7,385,390.80. The amount of "Cost attributable to Intangibles" was then ascertained by deducting said total cost basis of physical properties from the total cost basis of plaintiff's properties.

23. As stated in paragraph "16" hereof, since the total of $9,843,000 stated as the total cost basis of plaintiff's properties at December 31, 1912 does not include any value in respect of the 25,000 shares of plaintiff's common capital stock issued on December 18, 1905, which properties are included with those owned by plaintiff at December 31, 1912, if this Court should find that said 25,000 shares of the plaintiff's common capital stock were issued on December 18, 1905 in part consideration for the properties acquired from Extension Company, and if this Court should find that such stock had a fair market value then and in such event the total cost of plaintiff's properties at December 31, 1912 would be the sum of $9,843,000 plus said fair market value.

24. The date of December 31, 1912 has been used for the purpose of ascertaining the cost attributable to intangibles included in the total cost basis of plaintiff's property since subsequent to that date and up to the abandonment of plaintiff's street railway lines and operations as stated in paragraph "17" hereof no change has occurred in respect of such intangible costs.

25. If this Court should find that said 25,000 shares of the plaintiff's common capital stock were issued on December 18, 1905 in part consideration for the properties

acquired from Extension Company, and if this Court should find that said 25,000 shares of plaintiff's common capital stock issued on December 18, 1905 had a fair market value then and in such event:

(a) The total cost basis of plaintiff's properties at December 31, 1912 would be an amount determined as stated in paragraph "23" hereof.

(b) The cost of that part of plaintiff's properties attributable to intangibles would be an amount determined by deducting from the amount determined in subparagraph "a" of this paragraph the amount of $7,385,390.80 the latter being the cost of physical properties of plaintiff as stated in paragraph "21" hereof.

(c) The total obsolescence loss allowed for the years 1945, 1946 and 1947 would include 75% of the costs attributable to intangible costs determined as stated in subparagraph "b" of this paragraph in lieu of the amount of intangibles costs previously allowed by the Internal Revenue Service in the computation of such obsolescence loss as stated in paragraph "21" hereof.

(d) Recomputation of the obsolescence loss in respect of the abandonment of plaintiff's street railway operations in the recomputation of plaintiff's tax liability for period April 1, 1943 to December 21, 1943, the calendar years 1944 and 1947 and plaintiff's net loss for the calendar years 1945 and 1946 would be made in accordance with the facts as determined in subparagraphs "a", "b" and "c" of this paragraph.

26. Plaintiffs excess profits tax liability for the period April 1, 1943 to December 31, 1943 and the calendar year

1944 was calculated by application of an excess profits credit arising from determination of plaintiff's invested capital under the provisions of Section 718 and related sections of the Internal Revenue Code 1939.

27. The portion of plaintiff's equity invested capital referable to capital stock has been established in the sum of $5,662,316.44 for the period ended December 31, 1943, the calendar years 1944, 1945 and 1946 as shown by Schedule 5, 12, 20 and 28 respectively of the Revenue Agent's Report dated June 20, 1949 attached hereto as Exhibit H. In the determination of said amount, no amount was included therein in respect of the 25,000 shares of plaintiff's common capital stock issued on or about December 18, 1905 to the Extension Company.

28. If this Court should find that said 25,000 shares of plaintiff's common capital stock were issued on December 18, 1905 in part consideration for the properties acquired from Extension Company, and if this Court should find that such stock had a fair market value then and in such event the portion of plaintiff's equity invested capital referable to capital stock would be the sum of $5,662,316.44 plus said fair market value.

29. The record of bid and asked prices and sales of plaintiff's common stock on the New Orleans Stock Exchange as published in "The Daily Picayune", a newspaper of New Orleans, Louisiana, for the period January 6, 1906 to January 6, 1907 is shown by the statement hereto attached and made part hereof as Exhibit K.

30. Attached hereto and made part hereof as Exhibit L is a photostatic copy of a letter dated December 8, 1953

addressed to plaintiff's treasurer by a vice president of Union Planters National Bank, Memphis, Tennessee, containing information relating to market quotations in respect of plaintiff's common stock.

31. The record of bid and asked prices of plaintiff's common stock as indicated by quotations thereof published in the "Memphis Commercial Appeal", a newspaper of Memphis, Tennessee, for the months of January 1906 to December 1906, inclusive, is shown on the statement hereto attached and made part hereof as Exhibit M.

32. The record of bid and asked prices of plaintiff's common stock as indicated by quotations thereof published in the "Commercial & Financial Chronicle", a New York newspaper, for the months of March 1906 to December 1906, inclusive, is shown on the statement hereto attached and made part hereof as Exhibit N.

33. Attached hereto as Exhibit O is a statement copied from text which appears at pages 1060 and 1061 of Moody's Manual of Railroads and Corporation Securities for the year 1907. Such statement shows that American Cities Railway & Light Company, a holding company, had acquired during 1906 $2,153,500 par value of plaintiff's common stock on an exchange basis of $108 par value of American Cities Railway & Light Company common stock for each $100 par value of plaintiff's common stock.

34. Attached hereto as Exhibit P are photostatic copies of a record of the New Orleans Stock Exchange which show the shares of stock of American Cities Railway & Light Company traded during 1906 on the New Orleans Stock Exchange and the price at which said shares were sold.

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35. A summary of the gross revenues, expenses and net income of plaintiff for the five year period 1904 to 1908, inclusive, is shown on the statement hereto attached as Exhibit Q.

36. A copy of the balance sheets of plaintiff as at December 31, 1905 to 1908, inclusive, is attached hereto as Exhibit R.

37. In the computation of plaintiff's adjusted excess profits tax net income for the period April 1, 1943 to December 31, 1943 determined after application of net operating loss carryback applicable to such period the Commissioner of Internal Revenue through his examining agent increased plaintiff's excess profits net income for said period, as shown by Schedules Nos. 4 and 7 of the Revenue Agent's Report dated June 20, 1949 (Exhibit H attached), by multiplying the excess profits net income by three hundred and sixty-five and dividing the amount thus calculated by two hundred and seventy-five, said result being referred to in Schedule No. 7 of the Revenue Agent's Report as "excess profits net income annualized".

38. Plaintiff filed a corporation income tax return and an excess profits tax return for the period April 1, 1943 to December 31, 1943 with the Collector of Internal Revenue, Nashville, Tennessee. Said returns indicated an income tax liability of $208,424.78 and an excess profits tax liability of $757,092.92, or a total liability of $965,517.70. This total tax was paid to said Collector in installments as follows: $190,000.00 on or about March 15, 1944; $190,000.00 on or about June 15, 1944; $344,138.28 on or about September 15, 1944 and $241,379.42 on or about December 15, 1944.

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39. Subsequent to the filing of the income and excess profits tax returns for the period April 1, 1943 to December 31, 1943, plaintiff received tentative carry-back refunds in the amount of $624,872.43 by a check dated February 20, 1947. This amount was the difference between an excess profits tax overassessment in the amount of $757,092.92 and an assessed deficiency of income tax in the amount of $132,220.49.

40. A Revenue Agent's Report dated June 20, 1949 (Exhibit H) indicated an overassessment of income tax in the amount of $48,358.77 and an additional excess profits tax in the amount of $114,590.45 for the period April 1, 1943 to December 31, 1943, or a net deficiency of $66,231.68.

41. On or about December 27, 1949, plaintiff paid $66,231.68 to the Collector of Internal Revenue, Nashville, Tennessee. Said payment discharged plaintiff's liability for the net tax deficiency indicated in the aforesaid Revenue Agent's Report for the period April 1, 1943 to December 31, 1943.

42. With respect to the period April 1, 1943 to December 31, 1943, prior to the expiration of the period of limitation upon assessment of additional income and excess profits taxes for said period, consents executed by plaintiff and accepted by the Commissioner of Internal Revenue were filed extending the period of limitation upon assessments for said period to December 31, 1950.

43. On or about June 28, 1951, within the period of limitation prescribed by Section 322(b)(1) of the Internal Revenue Code of 1939, plaintiff filed with the Collector of

Internal Revenue, Nashville, Tennessee, a claim for refund of the sum of $253,002.58 or such greater amount including interest as is legally refundable with respect to the period April 1, 1943 to December 31, 1943. Said sum of $253,002.58 consisted of $138,412.13 of income taxes and $114,590.45 of excess profits taxes claimed to have been overpaid by plaintiff.

44. The Collector of Internal Revenue at Nashville, Tennessee, in a letter addressed to plaintiff under date of August 1, 1951 acknowledged receipt on June 28, 1951 of the claim for refund referred to in paragraph "43" hereof. A photostatic copy of said letter is hereto attached as Exhibit S.

45. On or about August 9, 1951, pursuant to a written request dated August 1, 1951, from the Collector of Internal Revenue, Nashville, Tennessee, for separate claims for each type of tax—one for income tax and one for excess profits tax—plaintiff filed with said Collector two supplementary claims with respect to the period April 1, 1943 to December 31, 1943. In one of these supplementary claims plaintiff demanded a refund of income taxes in the amount of $138,412.13 or such greater amount including interest as is legally refundable. In the other of these supplementary claims plaintiff demanded a refund of excess profits taxes in the amount of $114,590.45 or such greater amount including interest as is legally refundable. Plaintiff also returned to said Collector the claim originally filed with him on June 28, 1951 as stated in paragraph "43" hereof. A photostatic copy of a true copy of plaintiff's letter of transmittal of said claims to the Collector is hereto attached as Exhibit T.

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46. On or about April 24, 1957, the Commissioner of Internal Revenue notified The Memphis Street Railway Company by registered mail of the rejection and disallowance of all of the aforesaid claims for refund with respect to the period April 1, 1943 to December 31, 1943.

47. Plaintiff filed a corporation income tax return and an excess profits tax return for the taxable year 1944 with the Collector of Internal Revenue, Nashville, Tennessee. Said returns indicated an income tax liability of $231,296.55 and an excess profits tax liability of $481,444.74, or a total tax liability of $712,741.29. This total tax was paid to said Collector in installments as follows: $333,825.00 on or about March 15, 1945; $360,000.00 on or about June 15, 1945 and $18,916.29 on or about November 11, 1945.

48. Subsequent to the filing of the income and excess profits tax returns for the taxable year 1944, plaintiff received tentative carry-back refunds in the amount of $21,646.96 by a check dated February 20, 1947 and $62,315.37 by a check dated June 12, 1947. The amount of $21,646.96 was the difference between an excess profits tax overassessment in the amount of $40,677.24 and an assessed deficiency of income tax in the amount of $19,030.28. The amount of $62,315.37 was the difference between an excess profits tax overassessment in the amount of $290,542.41 and an assessed deficiency of income tax in the amount of $228,227.04.

49. A Revenue Agent's Report dated June 20, 1949 (Exhibit H) indicated an overassessment of income tax in the amount of $85,441.67 and an additional excess profits

tax in the amount of $306,366.27 for the taxable year 1944 or a net deficiency of $220,924.60.

50. On or about December 27, 1949, plaintiff paid $220,924.60 to the Collector of Internal Revenue, Nashville, Tennessee. Said payment discharged plaintiff's liability for the net tax deficiency indicated in the aforesaid Revenue Agent's Report for the taxable year 1944.

51. Prior to the expiration of the period of limitation upon assessment of additional income and excess profits taxes for the calendar year 1944, consents executed by plaintiff and accepted by the Commissioner of Internal Revenue were filed extending the period of limitation upon assessments for said period to December 31, 1950.

52. On or about June 28, 1951, within the period of limitation prescribed by Section 322(b)(1) of the Internal Revenue Code of 1939, plaintiff filed with the Collector of Internal Revenue, Nashville, Tennessee, a claim for refund of the sum of $398,981.36 or such greater amount including interest as is legally refundable with respect to the taxable year 1944. Said sum represented income and excess profits taxes claimed to have been overpaid by plaintiff.

53. The Collector of Internal Revenue at Nashville, Tennessee, in a letter addressed to plaintiff under date of August 1, 1951 acknowledged receipt on June 28, 1951 of the claim for refund referred to in paragraph "52" hereof. A photostatic copy of said letter is hereto attached as Exhibit S.

54. On or about August 9, 1951, pursuant to a written request dated August 1, 1951, from the Collector

of Internal Revenue, Nashville, Tennessee, plaintiff filed with said Collector a supplementary claim with respect to taxable year 1944. In said supplementary claim plaintiff demanded a refund of excess profits taxes in the amount of $456,591.36. Plaintiff also returned to said Collector the claim originally filed with him on June 28, 1951, as stated in paragraph "52" hereof. A copy of plaintiff's letter of transmittal of said claims to the Collector is hereto attached as Exhibit T.

55. On or about April 24, 1957, the Commissioner of Internal Revenue notified The Memphis Street Railway Company by registered mail of the rejection and disallowance of all the aforesaid claims for refund with respect to taxable year 1944.

56. Plaintiff filed a corporation income tax return for the taxable year 1947 with the Collector of Internal Revenue, Nashville, Tennessee. Said return indicated an income tax liability of $56,074.27 for the taxable year 1947. This total tax was paid to said Collector in installments as follows: $20,000 on or about March 15, 1948; $8,037.14 on or about June 11, 1948; $14,018.57 on or about September 13, 1948 and $14,018.56 on or about December 10, 1948.

57. A Revenue Agent's Report dated June 20, 1949 (Exhibit H) indicated an income tax deficiency in the amount of $9,235.32 for the taxable year 1947. Said deficiency was assessed and plaintiff paid $9,235.32 to the Collector of Internal Revenue, Nashville, Tennessee, on or about December 27, 1949.

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58. On or about February 16, 1950 plaintiff paid $746.41 to the Collector of Internal Revenue, Nashville, Tennessee, representing interest from March 15, 1948 to July 20, 1949 on the indicated income tax deficiency in the amount of $9,235.32 for the taxable year 1947.

59. On or about May 9, 1951, within the period of limitation prescribed by Section 322(b)(1) of the Internal Revenue Code of 1939, plaintiff filed with the Collector of Internal Revenue, Nashville, Tennessee, a claim for refund of the sum of $37,796.41 or such greater amount including interest as is legally refundable with respect to the taxable year 1947.

60. On or about April 24, 1957, the Commissioner of Internal Revenue notified The Memphis Street Railway Company by registered mail of the rejection and disallowance of the aforesaid claim for refund with respect to the taxable year 1947.

61. Plaintiff's books of account have been maintained and its tax returns have been filed for all periods here involved on an accrual basis.

62. Plaintiff's income for the period January 1, 1943 to March 31, 1943 was reported in the consolidated income tax return filed by National Power & Light Company and affiliates, and plaintiff's income for the period April 1, 1943 to December 31, 1943 was reported in a separate return filed by plaintiff for said period. Plaintiff's books of account have been maintained and its tax returns for all periods here involved have been filed on a calendar year basis.

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63. Should this Court find for the plaintiff in this action the parties hereto agree that the determination of the amount due plaintiff pursuant to such finding shall be made under Rule 38(c) of the Rules of this Court and that if such determination reveals an overassessment of income or excess profits tax and a deficiency of income or excess profits tax for the same taxable year said deficiency shall be applied in reduction of said overassessment for said taxable year.

64. The foregoing is in addition to the admissions contained in defendant's answer to plaintiff's petition.

/s/ E. Roy Gilpin
Attorney for Plaintiff

/s/ Charles K. Rice
Attorney for Defendant

/s/ Harold S. Larsen
Harold S. Larsen
Attorney.

APPENDIX C

Statutes and Regulations Involved

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

(53 Stat. 1, 13)

* * * * *

(l) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

* * * * *

(53 Stat. 1, 14, as amended by 26 U.S.C. (Supp. II, 1940 ed.))

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(53 Stat. 1, 40, as amended by 26 U.S.C. (Supps. I-V 1940 ed.))

* * * * *

SEC. 718. EQUITY INVESTED CAPITAL.

(a) *Definition.*—The equity invested capital for any day of any taxable year shall be determined

as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b)—

(1) *Money paid in.*—Money previously paid in for stock, or as paid-in-surplus, or as a contribution to capital;

(2) *Property paid in.*—Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in-surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. If the property was disposed of before such taxable year, such basis shall be determined under the law applicable to the year of disposition, but without regard to the value of the property as of March 1, 1913. If the property was disposed of before March 1, 1913, its basis shall be considered to be its fair market value at the time paid in. If the unadjusted basis of the property is a substituted basis, such basis shall be adjusted, with respect to the period before the property was paid in, by an amount equal to the adjustments proper under section 115(1) for determining earnings and profits;

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(4) *Earnings and profits at beginning of year.*—The accumulated earnings and profits as of the beginning of such taxable year;

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(54 Stat. 974, as amended by 26 U.S.C. (Supp. II, 1940 ed.)).

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Appendix C

Treasury Regulations 112, promulgated under the Internal Revenue Code of 1939:

SEC. 35.718-1. *Determination of Daily Equity Invested Capital—Money and Property Paid In.*—The equity invested capital for any day is determined as of the beginning of such day. The basis or starting point is found in the amount of money and property previously paid in for stock, or as paid-in-surplus, or as a contribution to capital. The terms "money paid in" and "property paid in" do not include amounts received as premiums by an insurance company subject to taxation under section 204. For the purpose of determining equity invested capital, the amount of any property paid in is the unadjusted basis to the taxpayer for determining loss upon a sale or exchange under the law applicable to the taxable year for which the invested capital is being computed. If the property was disposed of after February 28, 1913, and before such taxable year, such unadjusted basis shall be determined under the law applicable to the year of disposition, but without regard to the value of the property as of March 1, 1913; if the property was disposed of before March 1, 1913, its unadjusted basis shall be considered to be its fair market value at the time paid in.

If the basis to the taxpayer is cost and stock was issued for the property, the cost is the fair market value of such stock at the time of its issuance. If the stock had no established market value at the time of the exchange, the fair market value of the assets of the company at that time should be determined and the liabilities deducted. The resulting net worth will be deemed to represent the total value of the outstanding stock. In determining

net worth for the purpose of fixing the fair market value of the stock at the time of the exchange, the property paid in for such stock shall be included in the assets at its fair market value at that time.

If stock having no established market value is issued for intangible property, and it is necessary to determine the fair market value of such property, the following factors, among others, may be taken into consideration in determining such value: (a) the earnings attributable to such intangible assets while in the hands of the predecessor owner; and (b) any cash offers for the purchase of the business, including the intangible property, at or about the time of its acquisition. A corporation claiming a value for intangible property paid in for stock should file with its return a full statement of the facts relating to such valuation.

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"Sec. 35.718-2. Determination of daily equity invested capital—Accumulated earnings and profits. —(a) In general.—

"The term 'accumulated earnings and profits' is not defined in the Internal Revenue Code. See, however, section 115 and the regulations prescribed thereunder as to the effect of certain transactions on earnings and profits, and section 35.718-5 as to the effect of the declaration and distribution of dividends. In general, the concept of 'accumulated earnings and profits' for the purpose of the excess profits tax is the same as for the purpose of the income tax. As to determination of additional amount to be included in daily equity invested capital on account of new capital, see section 35.718-4. In computing accumulated earnings and profits as of the beginning

of the taxable year, a taxpayer keeping its books and making its income tax returns on the accrual basis shall subtract the income and excess profits taxes for the preceding taxable year. If there is a deficit in the accumulated earnings and profits as of the beginning of the taxable year, such deficit shall not be taken into account in determining invested capital, and in such cases the earnings and profits as of the beginning of the taxable year shall be considered as zero, but subsequent earnings and profits shall be applied against such deficit. Unrealized appreciation in value of property is not a factor in determining earnings and profits."

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